Supreme Court, U.S.
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No. 05-14

IN THE

Supreme Court of the United States

MARY CHRISTENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Defendant.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a trial judge must investigate whether intra-juror violence during deliberations has prejudiced a jury and whether that prejudice can be cleansed.

II. Whether an *Allen* charge is unduly coercive when given shortly after the failed polling of a jury's guilty verdict as well as the jury's subsequent notice of a "hostile situation" in the jury room involving juror fear and threats of physical violence between jurors necessitating the posting of Marshals outside doors to the jury room.

PARTIES

1. Mary Christenson, Petitioner
2. Eric Johnson, Co-defendant
3. United States of America, Respondent

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IN THE

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No. ___

MARY CHRISTENSON,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINION

Petitioner's conviction and sentence was affirmed by the Eleventh Circuit Court of Appeals in an unpublished opinion under the following caption, *United States v. Christenson et. al.*, No. 03-11387 (11th Cir. 2005).

JURISDICTION

This Petition for Writ of Certiorari follows a judgment of the Eleventh Circuit Court of Appeals affirming Petitioner's conviction and sentence. This Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(l).

The Eleventh Circuit Court of Appeals judgment was entered on February 8, 2005. Petitioner's application for rehearing was denied on April 5, 2005.

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The Petition for Writ of Certiorari relates to the following Constitutional provisions and statutes:

United States Constitution, Amendment, VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Evidence 606 (b)

Inquire into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Federal Rule of Criminal Procedure-Rule 23(b)

Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by

a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

STATEMENT OF CASE

Petitioner is currently serving a thirty-three month sentence following her conviction for conspiracy, false statement and mail fraud related offenses in the United States District Court for the Southern District of Florida. This Petition concerns the Eleventh Circuit Court of Appeals' affirmation of the district court's rulings involving the unique and bizarre jury deliberations which resulted in Christenson's conviction.

The initial appearance of a problem surfaced during the polling of the jury which had returned guilty verdicts as to both Christenson and co-defendant Johnson. The first six jurors affirmed that the guilty verdicts were in fact their verdicts. Juror number seven, however, appeared in obvious distress when questioned by the Court. During a colloquy with the Court, highlighted by juror number seven's crying and hesitation to answer the Court's questions, the juror ultimately asked the Court "can we talk first" before responding to the Court's verdict questions.

Pursuant to the juror's response, the Court sent the jury back to continue deliberations. The jury then informed the Court that they had not reached a unanimous verdict and asked the Court to recess for the evening. The Court accommodated the request.

The Court later stated that it had viewed the aborted guilty verdict as little more that an interruption before an ultimate guilty verdict.

> . . . I mean, it was pretty clear that this jury was going to come back guilty, . . . you know it was obvious when we

> got the message that they had reached a decision that it was going to be—to me it was clear it was going to be a guilty verdict. . . .

The next morning the first jury bombshell was received in the form of a note from the jury foreperson requesting a "one-on-one" meeting with the [Court] "because the jury room has become a **hostile situation**, and I, as jury foreman, need some direction." (Emphasis added.)

Defense counsel asked the district court to seek the jurors' description of the "hostile situation" before acting on the information in the note. Accordingly, with defendants' consent, the district court asked the jury to define the term "hostile situation" as presented in the jury's note to the district court.

The jury foreperson's response provided the second jury bombshell.

> Dear Judge: Hostile situation:
>
> 1. One jury member making threats upon another.
> 2. Myself having to step between 2 jury members to obtain order in the jury room.
> 3. One jury member feels scared.

The note concluded that "however we do feel we now have the situation under control."

The Defendants immediately requested a mistrial. The district court, which had earlier revealed that his "impression from my courtroom deputy that that's the concern, **that they have a concern for their safety**" (Emphasis added), responded:

> THE COURT: Get me some case law on it. I don't know of any case law on it. *I think it's a situation where jurors get heated and tempers flare and things happen.*

> They say they have got it under control. I am going *to ask the Marshal Service to have a court security officer at each door so that if there is a knock on the door, that there is someone at each door.*
>
> And the motion for a mistrial is denied.

(Emphasis added.)

The jury immediately informed the Court that "the jury, still do not have a unanimous decision and we are certain we, the jury, will not reach a unanimous decision."

The Government, which previously had unsuccessfully requested an *Allen* instruction at the time of the "hostile situation" jury communication as a means "maybe to calm things down", prevailed upon the district court to give the *Allen* charge over the defendants' objections. Guilty verdicts as to all twenty counts as to each defendant resulted quickly thereafter.

REASON FOR GRANTING THE WRIT

I. WHETHER A TRIAL JUDGE MUST INVESTIGATE WHETHER INTRA-JUROR VIOLENCE DURING DELIBERATIONS HAS PREJUDICED A JURY AND WHETHER THAT PREJUDICE CAN BE CLEANSED.

The Sixth Amendment guarantees a defendant the right to an impartial jury trial. Factual questions concerning a defendant's guilt or innocence may only be determined by an impartial jury of a defendant's peers. *See e.g. United States v. Dominguez*, 226 F.3d 1235, 1243 (11th Cir. 2000); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). Jury impartiality mandates the absence of coercion, fear of violence or physical threats during the course of jury deliberations. Once a jury has been contaminated by such juror misconduct a verdict from that jury should not be sustained unless the trial court has insured that the misconduct has terminated and all

jurors have been cleansed from the presumptive taint created from the misconduct

The failure of Christenson's trial court to inquire or weigh the prejudice as well as cleanse the taint of the misconduct requires reversal of her conviction.

A colorable claim of jury taint arising during jury deliberations, imposes a duty upon the trial court to investigate the allegation promptly. *United States v. Hunnewell*, 891 F.2d 955, 961 (1st Cir. 1989). The purpose of such an inquiry is to ascertain whether a taint-producing event occurred, and then, to determine the magnitude of the event and the extent of any resultant prejudice. *See United States v. Boylan*, 898 F.2d 230 (1st Cir. 1990). Such a procedure guarantees a constitutionally required unbiased jury. *See United States v. Bradshaw*, 281 F.3d 278, 289-290 (1st Cir. 2002); *United States v. Anello*, 765 F.2d 253, 258 (1st Cir. 1985).

A trial judge may dissipate the potential taint of misconduct by conducting interviews of jurors and investigating the effect of the resultant prejudice in light of claims of juror misconduct like that occurring in this jury room. *See e.g. United States v. Cox*, 324 F.3d 77 (2nd Cir. 2003); *United States v. Bradshaw*, 281 F.3d 278 (1st Cir. 2002); *United States v. Prosperi*, 201 F.3d 1355 (11th Cir. 2000); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998); *United States v. Harris*, 908 F.2d 728 (11th Cir. 1990). While "conducting an inquiry into a colorable question of jury taint is a delicate matter, and there is no pat procedure for such an inquiry," *Bradshaw*, 281 F.3d at 290, the question reduces to whether the trial court investigated the claim appropriately and resolved it in a satisfactory manner to protect the rights of the defendant. *Id.* Christenson's trial court failed to conduct any investigation and therefore never made a determination of the effect of the possible prejudice. Likewise no attempt was made to cleanse the prejudices.

The trial judge is in the best position to determine the nature of the alleged jury misconduct and determine the appropriate remedies for any misconduct. *United States v. Copeland*, 51 F.3d 611 (6th Cir. 1995). An investigation reasonably calculated to resolve the doubts raised about juror's impartiality and prejudice were mandated. *See e.g. Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *Oswald v. Bertrand*, 374 F.3d 475 (7th Cir. 2004); *United States v. Copeland*, 51 F.3d 611 (6th Cir. 1995). "[T]he Supreme Court has stressed that the remedy for allegations of jury bias is a hearing, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993). The appropriate inquiry is whether the juror misconduct has prejudiced the defendant to the extent that the defendant has not received a fair trial. *See United States v. Yoakam*, 168 F.R.D. 41 (D. Kan. 1996). Without an inquiry, the court is completely unable to perform this necessary function and make this critical evaluation.

The only inquiry from the Court was a request that the jury define the "hostile situation" in the jury room. The foreperson responded:

> "Dear Judge: Hostile situation.
>
> 1. One jury member making threats upon another.
> 2. Myself having to step between two jury members to obtain order in the jury room.
> 3. One jury member feels scared.
>
> However, we do feel we now have the situation under control."

Immediately following, the defense moved for mistrial again stating that the jurors could not be unbiased in an environment of fear and intimidation. But the court responded:

> THE COURT: Get me some case law on it. I don't know of any case law on it. *I think it's a situation where jurors get heated and tempers flare and things happen.*
>
> They say they have got it under control. I am going *to ask the Marshal Service to have a court security officer at each door so that if there is a knock on the door, that there is someone at each door.*
>
> And the motion for a mistrial is denied.

(Emphasis added.)

Obviously the district court realized that the deliberations had turned violent and acknowledged such by posting U.S. Marshals outside both jury room doors. Alternatively, however, the district court failed to conduct any inquiry. The district court decided that no further investigation was necessary into the jury misconduct simply because the note stated, ". . . we now have the situation under control." The statement that the situation was "under control" did not absolve the trial court from determining the *effect* of the misconduct upon the jury and what remedies might be required. The Eleventh Circuit Court of Appeals opinion relied upon *United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985). However, even in that decision the court conducted an inquiry and determined that the conduct did not affect the verdict rendered. In Christenson's case, the district court failed to conduct an inquiry posed at determining the effect of the misconduct prior to the rendering of a verdict.

The Appellate Court pointed to the foreperson's inclusion in his note that "we do feel we now have the situation under control" as justification for the district court's inaction. Unfortunately, stopping violence was not the only obligation of the district court. The district court was required to determine

what *effect* the misconduct had upon the jury and to insure that no juror would be intimidated by the violence to either compromise their zeal of advocacy or their conclusions concerning the defendants' guilt. Certainly the district court's failure to investigate the effect of the violence upon the jury deprived any fact finder or reviewing court the ability to determine the effect of the misconduct. *See e.g. Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); *United States v. Angulo*, 4 F.3d 843 (9th Cir. 1993).

The ability of any juror to advocate a position would no doubt be destroyed by threats of violence from jurors who disagreed with that juror's position. The intimidated juror would likely realize that their personal safety was dependant upon abandonment of either their position or advocacy of their position. Either response from a juror would result in the jury room turmoil being "under control". Either result would be violative of a defendant's Sixth Amendment rights.

A trial judge must be:

> ever watchful to prevent prejudicial occurrences and *to determine the effect of such occurrences when they happen.*

Smith v. Phillips, 455 U.S. 209, at 217 (1982). (Emphasis added.) Unfortunately, Christenson's trial court apparently ignored the *effect* which the juror threats, juror physical violence, and the juror safety concerns had upon the jurors and the jurors ability to continue deliberations without taint from what they had participated in and/or witnessed minutes earlier. Permitting deliberations to continue in such an infected atmosphere violated Christenson's fundamental Sixth Amendment right to an unbiased jury.

The Eleventh Circuit Court of Appeals decision incorrectly identifies Fed.R.Evid. 606(b) as an impediment to a trial court's pre-verdict inquiry concerning blatant jury misconduct. The Eleventh Circuit Court of Appeals' application of

Rule 606(b) is inconsistent with the Supreme Court's conclusion in *Tanner* that the trial court protects a criminal defendant's right to an unimpaired jury by being able to, among other responsibilities, receive information from jurors concerning "inappropriate juror behavior" before the jury renders a verdict. *Id.*

The opinion suggests that Rule 606(b), Fed.R.Evid. would preclude or retard pre-verdict judicial investigation of violence occurring during jury deliberations. Rule 606(b) states that its application is conditioned upon "an inquiry into the validity of a *verdict*". Christenson's juror misconduct arose during jury deliberation **prior** to a jury verdict. In *Tanner*, the Supreme Court analyzed Rule 606(b) and its common law and federal rule heritage. *Tanner* emphasized the language of Rule 606(b) and its goal of restricting impeachment of *verdicts*. *Tanner* further reviewed the social policy interest of verdict finality. More significant, *Tanner* specifically discussed how "Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process" 483 U.S. at 127. *Tanner* particularly described that protection to include:

> jurors are observable by each other, and may report inappropriate juror behavior to the court **before** they render a verdict.

Id. (Emphasis included.) (Citations omitted.)

The policy interests set forth in *Tanner* which mandate verdict immunity from post verdict accusations of internal juror misconduct are codified in Rule 606(b). Since Christenson's juror misconduct was discovered **prior** to the jury verdict, Rule 606(b) and the social policy underlying the Rule are inapplicable.

Christenson submits that the Eleventh Circuits' suggestion that Rule 606(b) inhibits judicial investigation is also inconsistent with implementation of Rule 23(b), Fed.R.Cr.P. For

instance, in *United States v. Polar*, 369 F.3d 1248 (11th Cir. 2004) and *United States v. Gabay*, 923 F.2d 1536 (11th Cir. 1991), the Eleventh Circuit validated judicial investigation of juror misconduct occurring during trial.

> The trial court's careful and lengthy investigation of the juror misconduct issue put that court in the best position to determine whether or not any juror misconduct deprived Gabay of his due process right to a fair trial.

United States v. Gabay, 923 F.2d at 1543.

Unfortunately, the district court's failure to investigate deprived Christenson of any determination of whether maintaining the twelve jurors violated her due process right to a fair trial.[1]

II. WHETHER THE *ALLEN* CHARGE IS UNDULY COERCIVE WHEN GIVEN SHORTLY AFTER THE FAILED POLLINC OF A JURY'S GUILTY VERDICT AS WELL AS THE JURY'S SUBSEQUENT NOTICE OF A "HOSTILE SITUATION" IN THE JURY ROOM INVOLVING JUROR FEAR AND THREATS OF PHYSICAL VIOLENCE BETWEEN JURORS NECESSITATING THE POSTING OF MARSHALS OUTSIDE DOORS TO THE JURY ROOM.

The Eleventh Circuit Court of Appeals decision concluded that the district court's *Allen* charge was not unduly coercive. *See Allen v. United States*, 164 U.S. 192 (1896). The four cases relied upon in the panel decision: *United States v. Rey*, 811 F.2d 1453 (11th Cir. 1987); *United States v. Dickerson*, 248 F.3d 1036 (11th Cir. 2001); *United States v. Trujillo*, 146 F.3d 838 (11th Cir. 1998); *United States v. Chigbo*, 38 F.3d

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[1] Christenson was also deprived of the potential use of Rule 23(b), Fed.R.Crim.P. as a vehicle to weed out the potential source of misconduct.

543 (11th Cir. 1994), fail to address the unique and bizarre circumstances of Christenson's jury.

Following the aborted guilty verdict, the district court believed that the jury would return a guilty verdict.

> . . . I mean, it was pretty clear that this jury was going to come back guilty, . . . you know it was obvious when we got the message that they had reached a decision that it was going to be—to me it was clear it was going to be a guilty verdict. . . .

Although the district court was not aware of the precise division in the jury vote, his belief that a guilty verdict was imminent following the questioning of juror number seven evidenced the coercive environment which precluded the giving of an *Allen* charge. *See United States vs. Spitz*, 696 72d 916 (11th Circuit 1983). The district court refused to evaluate the *effect* of the jury violence upon the jury members. Instead the district court only addressed the issue of whether the violence was continuing. While juror safety can never be minimized, it can not negate the need for the trial court to insure that a jury infected by the taint of violence will be able to continue its deliberations without intimidation.

Instead, the district court instructed the jury with the *Allen* charge with no reference to the jury violence which had taken place a short time earlier. Given the chronology of events, the giving of the *Allen* charge under these circumstances was unduly coercive.

Christenson submits that giving an *Allen* charge without first determining that the jury was untainted from the juror misconduct was improper. Without such cleansing, a normally accepted *Allen* charge, which is legally coercive, becomes unduly coercive.

CONCLUSION

Wherefore, based upon the foregoing authority, Petition respectfully requests that the Honorable Court accept jurisdiction over this matter, grant this Petition for Writ of Certiorari, address the questions presented herein, and reverse the judgment of the Eleventh Circuit Court of Appeals affirming Petitioner's sentence.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FORTHE ELEVENTH CIRCUIT

[Filed April 5, 2005]

No. 03-11387-II

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARY CHRISTENSON,
Defendant-Appellant,

ERIC JOHNSON,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

Before: HULL and MARCUS, *Circuit Judges*, and MILLS*, *District Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb. 8, 2005]

No. 03-11387

District Court Docket No. 01-06271-CR-WPD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARY CHRISTENSON,
Defendant-Appellant,

ERIC JOHNSON,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 8, 2005
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

[ISSUED AS MANDATE
April 13, 2005
U.S. COURT OF APPEALS
ATLANTA, G.A.]

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed February 8, 2005]

No. 03-11387

D.C: Docket No. 01-06721-CR-WPD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARY CHRISTENSON,
Defendant-Appellant,

ERIC JOHNSON,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before HULL and MARCUS, *Circuit Judges,* and MILLS*, *District Judge*.

MILLS, *District Judge*:

A 20-count indictment charged Mary Christenson and Eric Johnson with conspiracy to make false statements in mortgage applications submitted to federally-insured financial institutions and mail fraud conspiracy, in violation of 18 U.S.C. § 371 (count 1); making false statements in mortgage applications submitted to federally-insured financial institutions, in

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

violation of 18 U.S.C. §-1014 (counts 2-12); and mail fraud, in violation of 18 U.S.C. § 1341 (counts 13-20). Following a 22-day trial, Christenson and Johnson were convicted on all counts. Christenson was sentenced to 33 months' imprisonment and ordered to pay restitution of $595,649.56. Johnson was sentenced to 30 months' imprisonment, a fine of $12,500, and the same amount of restitution. Both Christenson and Johnson have appealed their convictions.

I. BACKGROUND

In June 1998, an investigation was commenced into numerous real estate transactions in Fort Lauderdale where properties allegedly were being purchased in the name of Howard Kratenstein, Trustee, and then resold at inflated prices to "straw buyers," who fraudulently obtained large mortgage loans to finance the purchases. The government theorized that Kratenstein, a cooperating witness at trial, was operating under the direction of James Christenson[1] when he established a trust entity to conceal the beneficial interest of Mr. Christenson in the subject transactions. Mr. Christenson was the beneficiary of the trusts and supplied the money to buy the properties; Kratenstein merely signed the documents. Mr. Christenson arranged for straw buyers to purchase the properties from Kratenstein, as trustee, at inflated prices using inflated appraisals. Large mortgages were obtained to finance the purchases.

The government alleges that Eric Johnson was a licensed mortgage broker who owned Atlantic Mortgage. James Christenson and Johnson entered into an agreement whereby Christenson agreed to give Johnson 12 mortgage loan originations over a 45-day period. The agreement also provided that Mr. Christenson would give Johnson a minimum of five

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[1] James Christenson was the son of Mary Christenson. Following his indictment in this case, Mr. Christenson died as a result of injuries sustained in an automobile accident.

mortgage loan originations per month, and Johnson would refund portions of the commissions he received on those originations. The government contends that Atlantic Mortgage completed the mortgage loan applications and submitted them to lenders. Some of the lenders began to question the proposals and would not approve the loans.

The government asserts that in June 1998, Mr. Christenson told Kratenstein that he could no longer use the straw buyers because their credit had run out. Mr. Christenson was looking for a new straw buyer and proposed using Kratenstein's father, but Kratenstein refused. In June 1998, Mr. Christenson introduced Mary Christenson to Kratenstein as the new straw buyer. Mr. Christenson used his mother as the straw buyer for the "Meredith properties," a group of rental properties located in Northwest Fort Lauderdale, in addition to other properties he owned in the name of Howard Kratenstein, Trustee.

The Meredith properties were so named because they were purchased from William Meredith. The properties were sold to Mr. Christenson for $3,920,000, a price that Meredith and his attorney thought exceeded their value. Mr. Christenson set up the Wm. Meredith Trust, Inc. to purchase the Meredith properties because the scheme using the Kratenstein trusts was under investigation at the time. The government alleges that Phillip Scotty Ragsdale, a convicted felon who did carpentry work for Mr. Christenson, was made president of Wm. Meredith Trust, Inc; the company was nevertheless controlled by Mr. Christenson.

The government contends that at the same time, Mr. Christenson brought his mother into HMK Properties, Inc., the company that managed the properties that he owned through the trusts and straw purchasers. Mary Christenson was to handle all the office work, while Kratenstein oversaw the construction work on the properties. In September or October 1998, James Christenson instructed Kratenstein to sign documents selling properties to Mary Christenson, the

new straw buyer. Mr. Christenson instructed Kratenstein on multiple occasions to deposit money into Ms. Christenson's bank account so there would be funds to use for the purchase of the properties from Kratenstein.

The government alleges that just before Mary Christenson began purchasing the properties, Mr. Christenson set up a fake transaction so that she would appear to have "clean" money with which to make the purchases. He then had his mother sell a property in Fort Lauderdale to William Patrick Regis, her boyfriend. Mr. Christenson gave Regis the $125,000 he needed to purchase the property from Ms. Christenson. At the closing, Mary Christenson received a check for $121,579.50, which was used as support for each of her 52 subsequent loans.

The government contends that between November 1998 and February 1999, Mary Christenson purchased 52 real estate properties for a total of $6,597,000, obtaining mortgages in the total amount of $5,117,278 in connection with the purchases. With one exception, each of the properties was purchased from one of the two trusts used by Mr. Christenson to conceal his real estate transactions. The one exception was a purchase by Mary Christenson from Joe Vegazo, who was one of the straw buyers used by James Christenson before he began using his mother. Each of the mortgage loans originated with Johnson at Atlantic Mortgage. Most of the properties were appraised by Dennis D'Agosta.

The government further notes that Louis Brawer, who worked for Johnson at Atlantic Mortgage, testified that a large portion of the company's work in late 1998-early 1999 was for Mr. Christenson. Johnson had Ms. Christenson sign 100 blank copies of the documents comprising a mortgage loan package. She then delivered the signed blank documents to Johnson on September 12, 1998. David Barie, a financial specialist with the State of Florida Comptroller's Office, visited Atlantic Mortgage on September 14, 1998 in connection

with his investigation of mortgage fraud. Barie noticed a stack ofblank mortgage disclosure documents signed by Mary Christenson.

The government contends Barie's investigation revealed that the files of all 52 of Mary Christenson's transactions contained false information as to her employment history, ownership of real estate, and debt. These mortgage loan applications, form 1003s, were signed by both Mary Christenson and Johnson when she applied for the mortgage loans. The government also notes that most of the files contained a copy of the check in the amount of $ 121,579.50 that Ms. Christenson received from Regis. Except for that check, Ms. Christenson's bank account contained insignificant amounts. Moreover, the files contained inaccurate information and omitted other information.

The government notes that several witnesses testified about the misrepresentations, the non-arms length nature of the transactions, undisclosed information, and other considerations which are important to a lender's decision to grant a loan. Another witness who was an expert in appraisals testified that almost all of Dennis D'Agosta's appraisals were grossly overvalued, sometimes as much as twice the fair valuation of the property.

The government further notes that Johnson testified he thought Mary Christenson was buying the properties from a group of investors using the Howard Kratenstein trust or William Meredith's trust, rather than from James Christenson. Moreover, Johnson tried to explain the submission of false mortgage applications by saying they were mistakes caused by his staff. Johnson testified he did not knowingly and willfully participate in any scheme to defraud, and that the mistakes were made by his processors. He admitted, however, that he had closed on a number of transactions between Howard Kratenstein, Trustee, and various straw buyers, all brought to Johnson by James Christenson, before

Johnson handled the mortgage applications for Mary Christenson. Johnson also admitted it was his responsibility to ensure that the information Mary Christenson gave him for the form 1003s was accurate.

The government alleges Mary Christenson testified that she purchased the properties as investments. She further testified that she did not know she was supposed to pay the taxes she owed when she filed her income tax returns, that she had not really thought about how the taxes would be paid, and that she did not mean to mislead anyone into thinking she had actually paid the taxes. Mary Christenson also testified that she did not realize that her son was providing the purchase money to the closing agent for the purchases. She was generally told that she only needed to bring about $1,000 to the closing, and she believed the rest was borrowed from the lender. Ms. Christenson never looked at the HUD-1 state ments she signed and never looked at her bank statements.

Most of the issues surrounding this appeal arose during the jury's deliberations. In an order denying Johnson's post-trial motion to interview jurors, the district court succinctly summarized the relevant facts pertaining to those issues:

> After a month long trial, the jury began its deliberations on Monday, November 18, 2002 in the late aftenoon[.] They deliberated for about an hour before being allowed to go home for the evening. The jury resumed its deliberations on Tuesday morning and continued to about 1:30 p.m. . . . The deliberations continued on Wednesday, November 20, 2002.
>
> Shortly before 3:57 p.m., the jury indicated that they had reached a verdict. The foreman indicated that the jury had arrived at verdicts on both defendants, concurred in by all jurors. The clerk published the verdicts, which were guilty on all counts as to both defendants. At the defense request, the jury was polled.

As the clerk started to ask the jurors whether the verdict was their verdict, Juror #7. . . began to cry. She continue[d] to cry while the first six jurors were polled. When asked if the verdict was her verdict, [Juror #7] said nothing. The Court asked the clerk to repeat the question and when she did, [Juror #7] answered in a faint voice, "yes."

In an abundance of caution, the Court indicated that it had not heard the answer. At that point, [Juror #7] asked "can we talk first?" The Court asked the jury to continue the deliberations.

After the jury returned to their deliberations, the prosecutor reminded everyone that [Juror #7] was the juror who had a medical problem, and the Court had scheduled several recesses in the trial to accommodate [Juror #7's] doctors' appointments.

The jury then sent a note indicating that they did not have a unanimous decision. The Court asked the jury to continue their deliberations and also asked if the jury would like to take a break for the evening. When more than one juror indicated that they would like to recess, the Court told them to return the next morning and resume their deliberations.

After less than an hour of deliberation on November 21, 2002, the jury sent out a note requesting a meeting with the Court and indicating that the jury room had become a hostile situation.

At defense counsel's request, the Court requested an explanation of what they meant by `hostile situation.' The jury then explained in a written response that the hostile situation involved: one jury member making threats upon another; the forman [sic] having to step between two jurors to obtain order in the jury room; and one jury member being scared. However, in conclusion,

the note indicated that they felt they had the situation under control.

The Government then requested an *Allen* charge; defense counsel objected, and the Court declined to give the instruction as being premature at that time. Then the jury sent out another note indicating that they did *not* have a unanimous decision and that they were certain that they would *not* reach a unanimous decision.

The Court modified the *Allen* charge at the defense request, and gave an *Allen* instruction; however, any *Allen* instruction was given over the defense objections. The jury deliberated about an hour before returning a unanimous guilty verdict on both defendants on all counts. The Court polled the jury, accepted the verdict, and discharged the jurors.

On appeal, Christenson and Johnson claim that the district court erred in failing to conduct an adequate inquiry into the "hostile situation" during jury deliberations. Moreover, Christenson alleges that the district court erred in denying her motions for mistrial on that basis. Christenson and Johnson also assert that the *Allen* charge[2] given by the court was impermissibly coercive. Finally, they contend there was insufficient evidence to support the jury's guilty verdicts.

II. DISCUSSION

A. Standard of Review

We review for abuse of discretion the district court's decision not to voir dire jurors regarding allegations of juror misconduct. *United States v. Dominguez*, 226 F.3d 1235, 1246-47 (11th Cir. 2000). The standard of review for the denial of a motion for a mistrial and a motion for a new trial

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[2] The instruction derives its name from *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

is abuse of discretion. *United States v. Abraham*, 386 F.3d 1033, 1036 (11th Cir. 2004). Our review of a district court's decision to give an *Allen* charge is limited to evaluating the coercive impact of the charge. *United States v. Trujillo*, 146 F.3d 838, 846 (11th Cir. 1998). Sufficiency of the evidence is a question of law which we review *de novo*. We view the evidence in the light most favorable to the jury's verdict and draw all reasonable inferences and credibility choices in favor of the jury's verdict. *Id.* at 845.

B. Jury Deliberations

Christenson and Johnson both allege that the district court erred in failing to fully investigate claims by the jury foreman that the jury deliberations had become a "hostile situation." This hostile situation occurred after a failed attempt to return a guilty verdict, when one juror did not acknowledge that the jury's purported guilty verdict was in fact her verdict. Shortly thereafter, the jury sent out a note stating, "Under the circumstances we do not have a unanimous decision." It was the following day when the jury informed the court of the alleged hostile situation.

Christenson and Johnson allege the district court erred in permitting deliberations to continue without conducting a further investigation of the alleged juror misconduct. The district court had informed the parties that he had the impression, based on information from his courtroom deputy, that members of the jury were concerned for their safety. In failing to investigate the alleged juror misconduct, the court may have been motivated by the jury foreman's statement that the situation was "under control." Christenson and Johnson contend, however, that because of its failure to investigate the misconduct, the district court had no basis to conclude that the misconduct had not irrevocably tainted the jury or that the conduct had not "chilled" the ability of jurors to advance their positions.

The government notes that at the trial, counsel for both appellants requested that the district court not conduct further inquiry into the alleged jury misconduct. Accordingly, any error was invited error. The government further notes that the morning after the verdict was aborted and the jury was sent back to deliberate, the jury foreman sent a note requesting a one-on-one meeting with the judge and stating that he needed some direction. Counsel for both Christenson and Johnson objected to the district court "taking any part in this particular foreman's suggestion, conclusion, whatever it might be, that there exists a `hostile' environment." They argued that the district court would not be able to discuss the issue with the foreman without getting into the deliberations to some degree. As a result, the court informed the foreman that he could not meet with him one-on-one, but that the foreman could put anything he wanted to say in writing. Additionally, the government contends that the district court was under no obligation to further investigate juror hostility, especially after the jury informed the court that the situation was under control.

Regarding the government's argument that any failure to investigate was "invited error," Christenson and Johnson now contend that the district court had an inherent duty to investigate and act appropriately, regardless of the position of the parties at the time.

We are unable to conclude that the district court abused its broad discretion in failing to further investigate the alleged "hostile situation" during deliberations. According to the jury foreman, the situation involved one juror threatening another and the foreman having to step between two jurors to obtain order. We recognize that jury deliberations can become heated at times. This may have been such an occasion. However, it appears that the situation was quickly resolved.

Significantly, neither appellant requested that the district court voir dire the jury as to the situation in the jury room. Moreover, any such inquiry by the court would have risked

delving into the substance of the deliberations and mental processes of the jurors in violation of Federal Rule of Evidence 606(b).[3] This Court has previously held that "failure to hold a hearing constitutes an abuse of discretion only when there is evidence that the jury was subjected to influence by outside sources." *United States v. Prosperi*, 201 F.3d 1335, 1340 (11th Cir. 2000) (quoting *United States v. Watchmaker*, 761 F.2d 1459, 1465 (11th Cir. 1985)). In *Prosperi*, this Court noted that the district court's decision not to investigate allegations of internal influence during deliberations was within its discretion, and "a contrary decision may have invited reversible error." 201 F.3d at 1340-41.

The appellants might have a better argument that further investigation would have been warranted if the situation in the jury room had persisted. However, following its initial inquiry, the district court was informed that the situation appeared to be under control. Under these circumstances, we decline to hold that the district court abused its discretion in failing to independently determine that a situation which appeared to be resolved should be investigated further.

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[3] Federal Rule of Evidence 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

This Court has recognized that the district court should be afforded broad discretion in addressing juror misconduct:

> The most salient aspect of the law in this area is the breadth of discretion given to judges who are called upon to deal with the possibility of juror misconduct. District court judges deal with jurors on a regular basis, and those judges are in the trenches when problems arise. The problems that present themselves are seldom clearly defined and a number of variables have to be considered. There are often no obviously right or wrong answers to the questions that arise. For all of these reasons, a trial judge is vested with broad discretion in responding to an allegation of jury misconduct, and that discretion is at its broadest when the allegation involves internal misconduct . . . In a number of decisions we have held that when a jury problem involves the possibility of internal misconduct, the trial judge's discretion extends even to the initial decision of whether to interrogate the jurors.

United States v. Dominguez, 226 F.3d 1235, 1246 (11th Cir. 2000) (internal quotations and citations omitted). We conclude that the district court's inquiry into the problems during jury deliberations was not an abuse of discretion. Based on the foregoing, we also find that the district court did not abuse its discretion in denying Christenson's motions for a mistrial.

C. The Allen Charge

Following the resolution of the "hostile situation," the district court denied the government's request for an *Allen* charge at that time. After the jury informed the court that it had not reached a unanimous verdict and it was certain that it would not reach a unanimous verdict, the court gave the *Allen* instruction over defense objections. The district court instructed the jury:

> Members of the jury, I am going to ask that you continue your deliberations in an effort to reach agreement upon a

verdict and dispose of this case, and I have a few additional comments I would like for you to consider as you do so.

This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously another trial would serve only to increase the costs to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to 12 men and women more conscientious, more impartial or more competent to decide it, or that more or clearer evidence could be produced.

If some of you are in favor of a conviction, those of you who disagree should consider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if some of you are in favor of acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence, but after full deliberation and consideration of the evidence in the case it is your duty to agree upon a verdict, if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.

> You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.
>
> I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all the other instructions I have previously given to you.

And with that I will ask that you retire and continue your deliberations.

Despite previously indicating it was certain that it would not reach a unanimous verdict, the jury returned with guilty verdicts on all counts approximately one hour after the *Allen* charge was given. The appellants allege the totality of circumstances rendered the *Allen* charge impermissibly coercive. They contend that the jury room was infected by threats of violence, fear and trepidation, and that one of the jurors was nearly hysterical in court. Johnson notes that the charge came at a time when there was demonstrable upheaval in the deliberative process, rendering each juror. more inclined to surrender to its coercive impact. Moreover, he asserts the deliberative process was characterized by an environment of fear, intimidation, and violence or threats of violence, which resulted in a need to post U.S. Marshals outside both doors to monitor for potentially violent flare-ups between jurors. Because of this and because the jury consisted of inherently indecisive jurors–one of whom repudiated her initial verdict in open court—Johnson argues that the *Allen* charge was impermissibly coercive after a month long trial.

Christenson alleges that because the district court failed to ascertain the remaining existence of threats and fear in the jury room, or the taint from the threats and fear which had been present minutes prior to the *Allen* charge, it is impossible to quantify the coercive influence of that instruction. She further notes that it is obvious that the jury was in an

intense state of fragility at the time. Moreover, Christenson contends that the language of the *Allen* charge could easily coerce an individual who was fearful as a juror and had been the target of recent threats to conclude that instead of articulating her position to the remaining jurors, she should re-examine her own views.

The government notes the district court's modified *Allen* charge was almost identical to the Eleventh Circuit Pattern Instruction. Moreover, the government contends there is nothing in this case to suggest that the jurors felt unduly coerced into reaching a verdict.

This Court has noted that the modern trend is against *Allen* charges. *United States v. Rey*, 811 F.2d 1453, 1458 (11th Cir. 1987). Since *Rey*, however, we have approved the use of such a charge in numerous cases. *See United States v. Dickerson*, 248 F.3d 1036, 1050-51 (11th Cir. 2001); *United States v. Trujillo*, 146 F.3d 838, 846-47 (11th Cir. 1998) (emphasizing that the jurors were instructed that "no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence"); *United States v. Chigbo*, 38 F.3d 543, 544-46 (11th Cir. 1994). In *Chigbo*, this Court determined that the speed with which the jury rendered a verdict in that case following the *Allen* charge (15 minutes) did not render the charge inherently coercive. *Id.* at 546. The *Allen* charge given in *Chigbo* was very similar to the charge given in this case. *See id.* at 544-45.

This Court's inquiry regarding the *Allen* charge is limited to a determination of whether the charge was unduly coercive. *Trujillo*, 146 F.3d at 846. We hold that the charge given in this case did not unduly coerce any of the jurors into rendering a verdict. The *Allen* charge given by the district court has been approved by this Court.

The charge specifically provided that "no juror is expected to give up an honest belief he or she may have as to the

weight or effect of the evidence." The jury in this case deliberated for a full hour, which was longer than the jury in *Chigbo*.

We recognize that because of the nature of the jury deliberations in this particular case, we are presented with factual circumstances which are somewhat unique. However, we are unable to conclude that the *Allen* charge given by the district court was unduly coercive.

D. Sufficiency of the Evidence

Both appellants argue that the evidence was insufficient to sustain convictions on any of the charged counts. Christenson asserts that the government failed to establish that she was anything other than an unwilling victim of the improprieties and negligence of others, especially the professionals who had been entrusted to legally prepare documents for her mortgage applications. Moreover, the government ultimately failed to prove that she had the necessary knowledge and intent to commit the offenses charged in the indictment.

Johnson notes that the district court recognized the absence of any direct evidence against him. He contends that he acted prudently in accordance with industry standards and practices. Johnson asserts, moreover, that the government failed to prove as a matter of law that he intended to defraud any person, party or entity, and the conviction should not stand because of the lack of scienter.

As the government notes, the appellants' arguments on this basis rely on their own testimony and construe the evidence in the light most favorable to themselves. The government presented more than sufficient testimony from which the jury could conclude that Johnson knew that he was submitting false statements in the mortgage loan packages he sent to the lenders for Mary Christenson, and that she provided false information and false documentation to support her applications for mortgage loans on the properties she purchased from

her son at inflated prices, using money he provided for down payments. The jury was free to disregard the appellants' self-serving testimony.

III. CONCLUSION

Based on the foregoing, we find no error by the district court. Accordingly, we AFFIRM the judgments of conviction and sentences of both appellants.

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

[Filed Dec. 30, 2002]

CASE NO. 01-6271-CR-DIMITROULEAS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARY CHRISTENSON and ERIC JOHNSON,
Defendant.

ORDER DENYING POST JUDGMENT RELIEF

THIS CAUSE having been heard upon Defendant Johnson's December 6, 2002 Motion For Judgment of Acquittal [DE-159] and Motion for New Trial [DE-160] and Defendant Christenson's December 6, 2002 Motion For New Trial and Motion for Judgment of Acquittal [DE-161], and the Court having reviewed the Government's Responses [DE-164 and 170], finds as follows:

1. On November 21, 2002, both Johnson and Christenson were found guilty on all twenty (20) counts of the indictment. [DE-148 and 149].

2. Both Johnson and Christenson have filed timely motions for new trial and judgment of acquittal.

3. As a basis for a judgment of acquittal or a new trial, Defendants make the following contentions:

A. Insufficient evidence of intent or knowledge;

B. Hostile environment in jury room;

C. Coercive *Allen*[1] charge;

D. Improper admission of "kick-back" evidence in Government's exhibits 431 and 432;

E. Improper closing argument by prosecutor.

4. The Court will rule consistently with its trial rulings and deny the motions and further indicates as follows:

A. The Court can not say that no reasonable jury would have returned a guilty verdict. *U.S. v. Sellers*, 871 F, 2d 1019, 1021 (11th Cir. 1989). Although the Court was "troubled" with the sufficiency of evidence at the close of the Government's case, Defendant Johnson's testimony did not help his case and very well may have contributed to his being convicted. In combination with other evidence, a jury's disbelief of a defendant's testimony may be used to help establish his guilt. *U.S. v. Brown*, 53 F. 3d 312, 314 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 909 (1996). Considering the entire record, the evidence was sufficient to support the convictions. *U.S. v. Alarcon*, 261 F. 3d 416, 421 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 854 (2002).

B. Any hostilities in the jury room did not emanate from outside sources. *U.S. v. Prosperi*, 201 F. 3d 1335, 1340 (11th Cir. 2000); *U.S. v. Briggs*, 291 F. 3d 958, 963-64 (7th Cir.), *cert. denied*, 123 S. Ct. 458 (2002). Any harassment or intimidation of one juror by another is not competent evidence to impeach a jury's verdict. *U.S. v. Norton*, 867 F. 2d 1354, 1366 (11th Cir.), *cert. denied*, 109 S. Ct 3192 (1989); *U.S. v. Casamayer*, 837 F. 2d 1509, 1515 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 813 (1989). It would not now be the basis for post judgment relief. For a more de-

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[1] *Allen v. U.S.*, 17 S. Ct. 154 (1896).

tailed account of the hostile environment facts, please see the court's order of December 27, 2002, denying a motion to interview jurors.

C. Here, the Court did not continue to poll[2] the jury after Ms. Uvo indicated that she would like to talk some more. By discontinuing the polling, the Court dissipated any coercive effect on Ms. Uvo or any other juror who may have wanted to change their guilty verdict. *See U.S. v. Chigbo*, 38 F. 3d 543 (11th Cir. 1994), *cert. denied*, 116 S. Ct. 92 (1995). The Court properly told the jury to continue their deliberations. *U.S. v. Brokemund*, 959 F. 2d 206 (11th Cir. 1992). At no time did the Court ever directly inquire of the jurors what the split was, in fact, the standard instruction given to them told them not to reveal any numerical divisions in notes that they might send out to the Court. Basic Instruction 12, Eleventh Circuit Criminal Jury Instruction (1997). *See U.S. v. Trujillo*, 146 F. 3d 838, 846 (11th Cir. 1998). When the jury indicated that they had a hostile environment, the Court denied the Government's request for an *Allen* charge. Only when the jury indicated that they were certain that they would not reach a unanimous decision did the Court give a modified *Allen* charge. About an hour later, the jury returned a guilty verdict. Defendants complain that the effect of the *Allen* charge was to coerce a guilty verdict from Juror #7, Ms. Uvo, and from the other jurors. Jury coercion from an *Allen* charge is determined by: 1) the content of the instruction; 2) the length of the deliberations after the instruction; 3) the total length of deliberations and 4) any indicia in the record of coercion. *U.S.*

[2] The polling of the jurors occurred at the request of defense counsel after the first guilty verdict was returned. The Court did not *sua sponte* ask the jury how it was split.

v. Washington, 255 F. 3d 483, 485 (8th Cir. 2001); *U.S. v. Dais*, 198 F. 3d 1167, 1179-80 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 498 (2000). Defendants complain about giving the *Allen* charge in conjunction with the hostile environment of the jury room. In *Early v. Packer*, 123 S. Ct. 362, 364 (2002) no constitutional violation was found where a state court judge gave an *Allen* charge in a situation where the jury was split 11-1 for conviction and the hold-out was complaining of feelings of distrust and disrespect from the other jurors and the hold-out had reached a point of anger and lack of objectivity. Additionally, this jury never said that it was hopelessly deadlocked, but even had they so indicated, an *Allen* charge could still have been given. *Gilbert v. Mullin*, 302 F. 3d 1166, 1174 (10th Cir. 2002). To determine whether the instruction was coercive, the court considers several factors. First, viewing the content of the instruction, it was a balanced instruction. *Lowenfield v. Phelps*, 108 S. Ct. 546 (1988), *compare, Smalls v. Batista*, 191 F. 3d 272, 281 (2d Cir. 1999). The instruction contained the necessary elements to moderate any prejudice. *U.S. v. Hernandez-Albino*, 177 F. 3d 33, 38 (1st Cir. 1999). Second, the length of the deliberations after the giving of the *Allen* charge can indicate the possibility of coercion. *Lowenfield v. Phelps*, 108 S. Ct. 546 (1988). However, other similar length deliberations have been held not to be coercive. *U.S. v. Dickerson*, 248 F. 3d 1036, 1051 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2659 (2002), *citing Andrews v. U.S.*, 309 F. 2d 127, 129 (5th Cir. 1962), *cert. denied*, 83 S. Ct. 939 (1963) (No coercion where verdict returned 25 minutes after *Allen* charge); *U.S. v. Arney*, 248 F. 3d 984, 990 (10th Cir. 2001) (verdict one hour after *Allen* charge); *U.S. v. Washington*, 255 F. 3d 483, 486 (8th Cir. 2001) (forty-five (45) minutes

after four (4) hours of deliberations on a four (4) day trial). Third, the total length of deliberations was proportionate for the length of this trial. Finally, viewing the totality of circumstances, the *Allen* charge was not coercive. *U.S. v. Reed*, 167 F. 3d 984, 990 (6th Cir.), *cert. denied*, 120 S. Ct, 229 (1999) (*Allen* charge not coercive even where hold-out juror had made verbal threats and attacks and acted in an intimidating manner, but the jury resolved its difficulties).

D. Initially, the Court excluded "kick-back" evidence and ordered it redacted from the exhibits. Perhaps, the Court's initial ruling was erroneous, perhaps, the "kick-back" evidence was relevant and admissible. It also may have been inextricably intertwined evidence. *U.S. v. Fallen*, 256 F. 3d 1082, 1090-91 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1190 (2002). However, when Johnson introduced his character evidence into the trial, at that point, certainly, the "kick-back" evidence became relevant and admissible. *U.S. v. Green*, 305 F. 3d 422, 431 (6th Cir. 2002); *U.S. v. Bonner*, 302 F. 3d 776, 781-82 (7th Cir. 2002); *U.S. v. Boone*, 279 F. 3d 163, 174 (3d Cir.), *cert. denied*, 122 S. Ct. 1986 (2002).

E. Perhaps, the Court should not have sustained objections to "kick-back" references in the Government's closing argument, given the Court's ruling that the evidence was properly admitted in the trial, it would have been fair comment on closing. Any error in the Court's ruling prejudiced the Government, not the Defendants.

Wherefore, Defendant's post-conviction motions are Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30th day of December, 2002.

/s/ William P, Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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600 S. Andrews Avenue, #500
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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

[Filed March 10, 2003]

UNITED STATES OF AMERICA,

v.

MARY CHRISTENSON.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 01-6271-CR WPD

Counsel For Defendant: Bruce Zimet, Esq.
Counsel For The United States: Jeffrey Kay, AUSA
Court Reporter: Anita LaRocca

The defendant was found guilty on Count 1-20 of the Indictment. Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 USC 371	Conspiracy to Commit Offenses Against the United States of America	11/8/2001	1
18 USC 1014	False Statements to a Bank	02/11/1999	2-12
18 USC 1341	Mail Fraud	01/04/1999	13-20

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address

until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No 392-44-0125
Defendant's Date of Birth: 08/13/1946
Deft's U.S. Marshal No.: 55989-004

Defendant's Mailing Address:
3021 NE 47th Street
Ft. Lauderdale, FL

Defendant Residence Address:
3021 NE 47th Street
Ft. Lauderdale, FL

Date of Imposition of Sentence:
March 7, 2003

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge
March 10, 2003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 33 Months.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the Additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in an approved inpatient/outpatient mental health treatment program, as directed by the U.S. Probation Office. The defendant will contribute to the costs of services rendered (co-payment) in an amount determined by the U.S. Probation Officer, based on ability to pay, or availability of third party payment.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall obtain prior approval from the U.S. Probation Officer before entering into any self-employment.

CRIMINAL MONETARY PENALTIES*

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$2,000	$	$595,649.56

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

It is further ordered that the defendant shall pay restitution in the amount of $595,649.56. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICORjob, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of $2,000 due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.